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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 EMMETT WESSON,

11 Defendant.  
12NO. CR-01-6027-RHW  
CV-05-5095-RHW**ORDER DISMISSING  
DEFENDANT'S MOTION TO  
VACATE, SET ASIDE, OR  
CORRECT SENTENCE BY A  
PERSON IN FEDERAL  
CUSTODY**

13 Before the Court is Defendant's Motion to Vacate, Set Aside, or Correct  
14 Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 (Ct. Rec.  
15 88). Defendant was convicted of Distribution of a Controlled Substance and was  
16 sentenced by this Court to a 168-month term of imprisonment; a five (5) year term  
17 of supervised release; a \$100 special penalty assessment; and the payment of \$400  
18 in restitution. Judgment was entered on November 25, 2002. Defendant did not  
19 appeal his sentence to the Ninth Circuit.

20 On January 23, 2006, the Court ordered Defendant to show cause why  
21 summary dismissal is not appropriate (Ct. Rec. 89). Defendant filed his response  
22 on March 13, 2006 (Ct. Rec. 90).

23 In conducting the Rule 4 analysis, the Court concluded that Defendant's  
24 Motion was time-barred under the Anti-Terrorism and Effective Death Penalty  
25 Act's one-year statute of limitation. In his motion, Defendant argued that the  
26 Controlled Substance Act is unconstitutional. In his response to the Show Cause  
27 Order, Defendant did not address whether equitable tolling of the statute of  
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1 limitations applies to this claim. Defendant's second claim is that *United States v.*  
2 *Booker*, 543 U.S. 220 (2005), renders his sentence *void, ab initio*. In his response,  
3 Defendant argues that the unconstitutionality of the pre-*Booker*, mandatory  
4 Guidelines cannot be restricted only to cases on direct review, and argues that  
5 *United States v. Cruz*, 423 F.3d 1119 (9<sup>th</sup> Cir. 2005) is not controlling.  
6 Defendant's response fails to establish how his asserted "new right" meets one of  
7 the exceptions set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a new  
8 rule of constitutional law generally does not apply to convictions that have become  
9 final, unless it falls under certain exceptions). Finally, in his motion, Defendant  
10 argues that he received ineffective assistance of counsel because his counsel did  
11 not advise him of his rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or  
12 raise an *Apprendi* claim on his behalf. In his response, Defendant failed to address  
13 why this claim is not barred by the statute of limitations.

14 Defendant's habeas petition is barred by the Anti-Terrorism and Effective  
15 Death Penalty Act's one-year statute of limitation and he has failed to establish that  
16 the statute of limitations is subject to equitable tolling.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence by a  
19 Person in Federal Custody Pursuant to 28 U.S.C. § 2255 (Ct. Rec. 88) is  
20 **DISMISSED.**

21 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
22 order and to provide a copy to Defendant and counsel.

23 **DATED** this 10<sup>th</sup> day of April, 2006.

24  
25 *s/ Robert H. Whaley*

26 ROBERT H. WHALEY  
27 Chief United States District Judge

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